

NOTICE OF PROPOSED RULEMAKING

RELEASE OF FINANCIAL ASSURANCES SURFACE MINING AND RECLAMATION ACT

NOTICE IS HEREBY GIVEN that the State Mining and Geology Board (SMGB) proposes to adopt the regulation described below after considering all comments and recommendations regarding the proposed action.

PROPOSED REGULATORY ACTION

The SMGB proposes to add Section 3805.5 to Article 11, California Code of Regulations (CCR), Title 14, Division 2, Chapter 8, Subchapter 1. The proposed regulation clarifies and makes specific the process by which a financial assurance instrument may be modified, or may be released by the lead agency and the Department of Conservation following the completion of the reclamation of lands disturbed by a surface mining operation.

PUBLIC HEARINGS AND WRITTEN COMMENTS

The SMGB has not scheduled a public hearing on this proposed action; however, the SMGB will hold a hearing to receive comments if it receives a written request for a public hearing from any interested person, or his/her authorized representative, no later than 15 days before the close of the written comment period. The hearing facility will be barrier free in accordance with the Americans with Disabilities Act. At the hearing, any person may present statements or arguments orally or in writing relevant to the proposed action described in the Informative Digest. The SMGB requests, but does not require, that persons who make oral comments at the hearing also submit a written copy of their testimony.

Any interested person may submit written comments relevant to the proposed regulatory action to the SMGB. The Written Comment Period closes at 4:00 P.M., August 25, 2003. The SMGB will consider only relevant comments received at the SMGB office by that time.

AUTHORITY AND REFERENCE

The SMGB proposes to adopt the regulation amending Section 3805.5 to Article 11, California Code of Regulations, Title 14, Division 2, Chapter 8, Subchapter 1, pursuant to its authority granted in the Surface Mining and Reclamation Act (SMARA, PRC § 2710 et seq., and specifically PRC §2755). Reference: Sections 2729, 2731, 2735, 2773.1, 2774, and 2774.1.

INFORMATIVE DIGEST

SMARA was enacted to ensure that any significant adverse impacts of mining to the environment are prevented or mitigated and public health and safety are protected. Under SMARA, surface mining operators are required to submit to their respective lead agencies (cities and counties) for approval, a plan for reclaiming lands disturbed by mining activities, as well as proof of financial assurances to ensure that those disturbed lands are reclaimed in accordance with the approved reclamation plan. Lead agencies are responsible for ensuring their surface mining operators are in compliance with SMARA's permit, reclamation, and financial assurance requirements. The Department of Conservation (DOC) and the SMGB provide lead agency assistance and oversight.

SMARA became effective on January 1, 1976. The Legislative findings and declarations are contained in Public Resources Code (PRC) Section 2711, and the Legislative intent is cited in PRC Section 2712.

The Surface Mining and Reclamation Act requires that prior to the commencement of surface mining operations, the operator shall obtain a financial assurance for the operations from the lead agency (PRC §2770). SMARA, also, requires that the lead agency approve the amount of the financial assurance as sufficient to reclaim the lands disturbed by the mining activities, as well as the adequacy of the financial assurance instrument itself. The amount of the instrument is determined in accordance with the provisions of PRC §2773.1 and 14CCR Article 11, specifically §3804.

Financial assurances are to be specific to each surface mining operation and based on the requirements of the approved reclamation plan for that surface mine. The financial assurance instrument shall remain in effect until surface disturbances created by the mining activities have been satisfactorily reclaimed by the operator in accordance with the reclamation plan. (PRC §2773.1[a][2], [c]).

Annually, the financial assurance for a surface mine must be adjusted (modified), if needed. In order for the lead agency to determine if any change to the financial assurance amount is necessary, the operator is required annually to submit to the lead agency a written calculation of the financial assurance amount as provided for under 14CCR §3804. The lead agency is required to provide a copy of the financial assurance calculation to the Director of the Department of Conservation, along with all supporting information and documentation upon which the financial assurance calculation is based, as well as indicate to the DOC that the calculated financial assurance amount is adequate to complete reclamation according to the approved reclamation plan. The DOC is provided not less than 45 days to review and comment on the financial assurance calculation (PRC §2774 [d][1], 14CCR §3805).

Financial assurance instruments must be made payable to the lead agency, and to the Department of Conservation (PRC §2773.1[a][4]); thus, both the lead agency and the DOC are beneficiaries with equal standing. Also, both the lead agency and the DOC are enforcing agencies regarding the forfeiture of financial assurances under PRC §2773.1 (b) and (d).

PRC §2773.1(c) provides that a financial assurance shall be released upon written notification to the DOC from the lead agency that reclamation has been completed in accordance with the approved reclamation plan. The completion of reclamation is the basis for a new financial assurance calculation; that is, no financial assurance amount is required because reclamation has been completed and there are no further outstanding costs for which the operator is liable.

Under PRC §2774 [d][1] and 14CCR §3805, the DOC is provided not less than 45 days to review the financial assurance calculation. This is necessary since the DOC is both a co-beneficiary of the financial assurance instrument, as well as a responsible enforcer for the reclamation of the site if the lead agency fails to take appropriate actions to ensure reclamation (PRC §2773.1[b] and [d]).

SMARA provides under §2774(b) that, not less than once in each calendar year, the lead agency shall conduct an inspection of each surface mine within its jurisdiction to determine if the mine is in compliance with SMARA. The inspection report must be provided to the DOC, it shall contain a statement regarding the surface mining operation's compliance with SMARA, and it shall specify which aspects of the surface mining operation are inconsistent with SMARA.

Therefore, prior to the release of the financial assurance instrument to the operator, the lead agency must provide to the DOC an inspection report stating that the mine site is in compliance with the requirements of SMARA and its reclamation plan, and a financial assurance calculation pursuant to 14CCR §3805 that shows no further reclamation cost liabilities. The DOC, under both PRC §2774 [d][1] and 14CCR §3805, is provided not less than 45 days to review the financial assurance calculation and supporting documents (including the inspection report).

The DOC may, as a responsible enforcing agency under SMARA, and during the 45 day review period, conduct its own inspection of the mine site pursuant to PRC §2774.1(a) to determine if the mine has been reclaimed in accordance with its reclamation plan requirements and conclude that there are no further outstanding reclamation liabilities to be included in the financial assurance.

If the DOC determines, upon an inspection pursuant to PRC §2774.1(a), that there is an outstanding compliance issue, then it may notify the operator and the lead agency of its finding and indicate the specific deficiency that needs correcting. In this case, the lead agency could not release the financial assurance instrument since the mine site was not fully reclaimed in compliance with SMARA.

If the DOC determined that the site was in compliance with SMARA, and that there were no longer any outstanding liabilities for reclamation on the part of the operator, the DOC may notify the lead agency of its concurrence to release the financial assurance instrument.

POLICY STATEMENT OVERVIEW

The proposed language of the regulation clarifies and makes specific the process by which a financial assurance instrument that has been submitted by a surface mine operator and approved by the lead agency may be modified, or be released to the operator upon the successful completion of the reclamation of lands disturbed by the surface mining activities. This regulation is necessary in order to protect the California public and environment by clarifying the process by which financial assurances that guarantee funding for the reclamation of mined lands may be modified, or released, so as to ensure that those fund guarantees are not modified or released based on incorrect or incomplete information. Specifically, this regulation addresses PRC Sections 2729, 2731, 2733, 2735, 2773.1, 2774, and 2774.1.

CEQA COMPLIANCE

The SMGB staff have determined that this rule making project is either not a project under Title 14, CCR Section 15378 of the CEQA Guidelines, or is Categorically Exempt under Title 14, CCR Section 15308 of the CEQA Guidelines.

DISCLOSURES REGARDING THE PROPOSED ACTION

The SMGB staff has made the following preliminary determinations:

Mandate on local agencies and school districts: The SMGB staff determined that adoption of this regulation does not impose any new mandates on local agencies or on local school districts.

Costs or savings to any State agency: The SMGB staff determined that no savings or additional expenses to state agencies are identified.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code §§ 17500 through 17630: The SMGB staff

determined that the adoption of this regulation does not impose any additional cost obligations on local agencies or on local school districts.

Other non-discretionary costs or savings imposed upon local agencies: The SMGB staff determined that no other non-discretionary costs or savings to local agencies are identified.

Cost or savings in Federal funding to the State: The SMGB staff determined that no costs or savings in Federal funding to the State are identified.

Significant statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states: SMGB staff determined that no statewide adverse impacts to California businesses result from the adoption of this proposed regulatory language.

Potential cost impact on private persons or directly affected businesses: The SMGB staff is not aware of any cost impacts on private persons or directly affected businesses.

Creation or elimination of jobs in California: The SMGB staff has determined that the adoption of these regulations will not:

- Create nor eliminate jobs within California;
- Create new nor eliminate existing businesses within California;
- Expand businesses currently doing business in California.

Significant effect on housing costs: The SMGB staff has determined that the adoption of these regulations will have no significant effect on housing costs.

Effects on small businesses: SMGB staff has determined that there is no additional impact on private persons or businesses; this proposed regulation serves to clarify and make specific existing requirements contained in statute. This proposed regulation does not mandate actions upon private persons or businesses, but rather clarifies existing statute.

CONSIDERATION OF ALTERNATIVES

The SMGB must determine that no reasonable alternative that it considers or that has otherwise been identified and brought to the attention of the SMGB would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed

action. SMGB staff has not identified any adverse impacts resulting from these proposed regulations.

No alternatives have been considered by the SMGB that would be more effective in carrying out the purpose for which these regulatory changes are proposed, nor have any other alternatives been proposed that would be as effective and less burdensome to affected private persons, lead agencies, or small businesses.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF REGULATIONS

An interested person may request a copy of the proposed regulations and the Initial Statement of Reasons, or direct questions about the proposed regulations and Initial Statement of Reasons and inspect all supplemental information, upon which the regulation is based, contained in the rulemaking file. The rulemaking file is available for inspection at the SMGB Office at 801 K Street, Room 1700, Sacramento, California, between 9:00 A.M. and 4:00 P.M., Monday through Friday except during state holidays. Copies of the proposed regulations and the Initial Statement of Reasons may be requested by writing to the above address, or viewed on the SMGB's Internet Web Site at: <http://www.consrv.ca.gov/smgb>

AVAILABILITY OF CHANGED OR MODIFIED TEXT

Following the public comment period, the SMGB may adopt, as final, the proposed regulations substantially as described in this Notice and Informative Digest. Copies of these regulations, as finally adopted, will be sent to all persons on the SMGB's public comment mailing list for this issue and others requesting copies. If, as a result of public comment, substantive changes to these regulations are deemed appropriate, copies of the proposed changes will be sent to all persons who testified at the public hearing or submitted written comments during the comment period or at the public hearing, and to those who have requested copies of information regarding the regulation.

Thereafter, the SMGB will accept written comments for a period of at least 15 days (prior to adoption) after the date upon which changes were made available. If adopted, the regulations will appear in CCR, Title 14, Division 2, Chapter 8, Subchapter 1, Article 11, Section 3805.5. A copy of the Final Statement of Reasons may be obtained by contacting the SMGB office as described under the section Contact Person.

CONFLICT WITH FEDERAL REGULATIONS

This regulation does not duplicate or conflict with existing Federal statutes or regulations. Also, by Memorandum of Understanding with the Federal Bureau of Land Management, the U. S. Forest Service, the Department of Conservation, and the State Mining and Geology Board, SMARA and federal law are coordinated to eliminate duplication.

CONTACT PERSON

Inquiries concerning the substance of the adopted regulation should be directed to:

Ms. Kit Gonzales, Executive Assistant
(or as a backup)
John G. Parrish, Ph. D., Executive Officer
State Mining and Geology Board
801 K Street, MS 24-05
Sacramento, California 95814

INITIAL STATEMENT OF REASONS

GENERAL PURPOSE AND CONDITION ADDRESSED

This rulemaking adds Section 3805.5 to Article 11, California Code of Regulations (CCR), Title 14, Division 2, Chapter 8, Subchapter 1. The proposed regulation clarifies and makes specific the process by which a financial assurance instrument may be modified, or released by the lead agency and the Department of Conservation following the completion of the reclamation of lands disturbed by a surface mining operation. Specifically, this regulation addresses PRC Sections 2729, 2731, 2733, 2735, 2773.1, 2774, and 2774.1.

SPECIFIC PURPOSE

The proposed added regulatory language is intended to clarify and make specific the process by which a financial assurance instrument that has been submitted by a surface mine operator and approved by the lead agency may be modified, or be released to the operator upon the successful completion of the reclamation of lands disturbed by the surface mining activities.

§3805.5 Modification or Release of Financial Assurance

§3805.5(a) – This subsection states that a financial assurance instrument may only be released by the lead agency to the operator upon the concurrence of the Director of the Department of Conservation (Director) that the operator successfully has completed reclamation of the mine site in accordance with the requirements of the lead agency approved reclamation plan. This section is necessary since the Director, by statute, is a co-beneficiary of the financial assurance instrument and, also, is statutorily mandated to enforce compliance with the requirements of the Surface Mining and Reclamation Act and the approved reclamation plan. If the financial assurance instrument is released without the operator successfully completing reclamation of the site, then no funds will be available to the Director or the lead agency to successfully complete the reclamation activities. Since the Director is a co-beneficiary of the financial assurance instrument, he/she has a control over the release of the instrument.

§3805.5(b) – SMARA requires that prior to the modification or release of a financial assurance instrument, the lead agency must provide the Director with documentation supporting the proposed changes to the instrument. This subsection clarifies and makes specific the documentation necessary for the Director to make an evaluation.

1) The Inspection Report for the mine site as required to be prepared at least once in each calendar year. This inspection report, prepared by a qualified inspector, provides information as to the compliance of the mine with its reclamation plan, and whether or not there are remaining reclamation issues to be addressed.

2) A Financial Assurance Cost Estimate is required to demonstrate and support how a modified amount was calculated, or to show that no further amount is necessary.

3) A statement from the lead agency that the mined lands are still subject to a financial assurance as modified, or that the mine successfully has been reclaimed and recommending that the financial assurance instrument be released. This statement may be supported by additional geological and engineering reports prepared either during the annual inspection, or compiled separately. PRC §2774 requires that the lead agency submit this statement and any supporting documentation.

§3805.5(c) – SMARA (PRC §2774) provides that the Director has 45 days from receipt of the financial assurance documents provided by the lead agency to review those documents. During this review period, the Director may, under SMARA (PRC §2774.1) conduct his/her own inspection of the site to confirm the information supplied by the lead agency. This review and inspection authority is provided in statute to allow the Director to more fully understand and resolve questions he/she may have regarding the information supplied, and to carry out the Director's responsibilities to see that SMARA is properly administered and enforced. This subsection is necessary to clarify the process by which the Director may go about conducting his/her review, and the responses that may be made to the lead agency.

1) The Director may concur with the findings of the lead agency that the financial assurance requires modification, or release, and so notify the lead agency. This subsection is necessary to clarify the Director's role as a co-beneficiary to the financial assurance instrument and an enforcer of SMARA.

2) The Director may, also, inform the lead agency that he/she has found the additional reasons to modify the financial assurance, or that the site has not been reclaimed in accordance with the requirements of the approved reclamation plan and, therefore, the financial assurance cannot be released. This subsection is necessary to clarify the Director's role as a co-beneficiary to the financial assurance instrument and an enforcer of SMARA.

§3805.5(d) – This subsection is necessary to clarify that, based on the inspections of either, or both, the lead agency and the Director, if it is determined that a violation of SMARA exists, then the financial assurance instrument cannot be released. SMARA provides under PRC §2773.1 that financial assurances can only be released upon the determination that reclamation successfully has been completed. If a violation of SMARA is determined, then the site cannot have been successfully reclaimed and the financial assurances must remain in force.

STATEMENT OF NECESSITY

SMARA requires that upon the termination of surface mining operations, lands affected by the mining operations shall be, *“reclaimed to a usable condition which is readily adaptable for alternate land uses and create no danger to public health or safety.”*[PRC §2733] In order to ensure that this is accomplished, surface mine operators must provide financial assurances to the lead agency and the State of California that guarantee funds for the completion of reclamation of mined lands according to an approved reclamation plan. When those funds are no longer required, they are returned to the operator. However, if those funds are return to the operator prematurely, that is, prior to the completion of reclamation, then neither the lead agency nor the state will have available funds to complete reclamation, thus leaving the mined site in an environmentally unsound state that may be dangerous to the public health and safety.

This regulation is necessary in order to protect the California public and environment by clarifying the process by which financial assurances that guarantee funding for the reclamation of mined lands may be modified, or released, so as to ensure that those fund guarantees are not modified or released based on incorrect or incomplete information.

IDENTIFICATION OF TECHNICAL / THEORETICAL / EMPIRICAL STUDY, REPORTS, OR DOCUMENTS UPON WHICH THE SMGB HAS RELIED

No technical, theoretical, empirical studies, reports, or documents were prepared or relied upon by the SMGB in its consideration of this rulemaking.

PROPOSED TEXT (Added text underlined)

§3805.5 Modification or Release of Financial Assurance

(a) The financial assurance required under Public Resources Code Section 2773.1 shall only be released by the lead agency to the operator upon written concurrence of the director that the completion of reclamation of the mined lands disturbed by surface mining operations is in accordance with the requirements of the lead agency approved reclamation plan.

(b) Prior to the modification of a financial assurance amount, or to the release of the financial assurance instrument to which both the lead agency and the Department of Conservation are co-beneficiaries under Public Resources Code Section 2773.1, the lead agency shall provide to the director of the department the following documents at one time:

(1) An inspection report, prepared by a qualified person as provided for in Public Resources Code Section 2774, indicating that there are aspects of the surface mining operation that require modification of the existing financial assurance amount, or stating that the mined lands have been reclaimed in accordance with the approved reclamation plan, and that there are no aspects of the reclaimed surface mining operations that are inconsistent with the meaning of reclamation as defined in Public Resources Code Section 2733, and the Surface Mining and Reclamation Act of 1975, Chapter 9, commencing with Section 2710.

(2) A revised financial assurance cost estimate prepared by the operator and accepted by the lead agency, or prepared by the lead agency, in accordance with Public Resources Code Section 2773.1, with supporting documentation, indicating the specific cost changes to the existing financial assurance amount, or indicating that there are no further outstanding reclamation liabilities to be included in the financial assurance.

(3) A statement by the lead agency, with supporting documentation that may include the most recent inspection report and any geological and engineering reports prepared as part of the inspection report, that the mined lands remain subject to a financial assurance as modified, or that the mined lands have been reclaimed in accordance with the approved reclamation plan, that there are no outstanding reclamation liabilities, and recommending to the director that the financial assurance be released.

(c) The director shall have 45 days from the date of receipt of the documents to review and comment on them as provided for in Public Resources Code Section 2774, and to conduct the director's own inspection of the surface mining operations if the director determines it necessary under Public Resources Code Section 2774.1, and do one of the following:

(1) Notify the lead agency of the director's concurrence that the modified financial assurance amount is adequate, or that there are no outstanding reclamation liabilities

on the mined lands and that the financial assurance should be released pursuant to Public Resources Code Section 2773.1, at which time the financial assurance shall be released; or,

(2) Notify the lead agency that the director has found, based upon an inspection, aspects of the surface mining operations that require additional modifications to the financial assurance amount, or aspects that are not in compliance with the approved reclamation plan and the Surface Mining and Reclamation Act of 1975, and that the financial assurance shall not be released until the violation is corrected.

(d) If a violation of the surface mining operations is confirmed by an inspection either by the lead agency or by the director , then the lead agency, or the director, may take actions under Public Resources Code Section 2774.1 to ensure that the violation is corrected. In any event, the financial assurance shall not be released until the violation is corrected.

Note: Authority: Section 2755, Public Resources Code; References: Sections 2729, 2731, 2733, 2735 2773.1, 2774, and 2774.1, Public Resources Code.